COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 035067-96 027406-02**
Sandra Kautz	Employee
Sloane & Walsh	Employer
Travelers Insurance Company	Insurer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine[1])

APPEARANCES
Nancy L. Hall, Esq., for the employee
Frances D. O'Toole, Esq., for Travelers Insurance Co. at hearing
Beth R. Levenson, Esq., for Travelers on brief
Patricia C. Frazier, Esq., for Hartford Insurance Co.

COSTIGAN, J. Travelers Insurance Company (Travelers), the first insurer in this successive insurer case, appeals from an administrative judge's decision denying its complaint to modify or terminate payment of weekly § 35 partial incapacity benefits, and ordering it to pay for the employee's continuing medical treatment, including Botox injections. Travelers mounts three challenges to the decision. First, it argues that because the § 11A impartial medical report failed to address several key medical issues, the judge erred in denying its motion to declare the report inadequate. Second, Travelers maintains that Hartford Insurance Company (Hartford), which came on the risk several years after the employee's 1996 accepted upper extremities injury, was liable for any ongoing medical benefits due the employee, because she had suffered a new, cumulative injury while working a modified job. Third, Travelers contends that the award of continuing Botox treatments was error because they were no longer beneficial to

[1] Judge Levine no longer serves on the reviewing board.

the employee, and therefore were neither reasonable nor necessary, under §§ 13 and 30 of c. 152. Finding no merit in any of these arguments, we affirm the decision.

We summarize the judge's pertinent subsidiary findings of fact, and the relevant procedural history of the case. Sandra Kautz, a high school graduate, was forty-nine years old at the time of the November 8, 2002 hearing.[2] She began working for the employer law firm in 1994 as a legal secretary, a position which involved mostly typing. (Dec. 5-6; Tr. 31.) In 1995, she began experiencing muscle spasms, numbness, and inability to grasp in both hands. By May 1996, she was no longer able to type. The employer transferred her to the position of paralegal in May 1996, (Tr. 34, 39), and, over time, provided her with a voice activated computer, a special chair, a wide keyboard, and a foot rest. Since then, with these accommodations, the employee has been able to work a reduced schedule (thirty-three hours per week at the time of the November 2002 hearing) as a paralegal. In that position, she manages complex litigation cases, summarizes medical records, assists in trial preparation, and researches opposing parties' expert witnesses via the internet. Her work activities have remained basically the same since May 1996, though she currently does less lifting. (Dec. 6.)

In 1997, Ms. Kautz began treating with Dr. Joseph Audette, who diagnosed her with local dystonia in both arms and thoracic outlet syndrome. (Dec. 7.) Dr. Audette treated the employee with Botox injections in her arms, which dramatically reduced her pain and numbness for several months. Initially, the injections were given every six months, but they were later increased to three times a year. Her last injection, a couple of months prior to the hearing, did not provide adequate relief, and another injection was scheduled for the week after the

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[2] The judge found that the employee was fifty years old at the time of the hearing. This was error, as the employee testified she was forty-nine, (Tr. 7), and her biographical data form lists her date of birth as August 23, 1953. (Ex. 1.)

hearing. The employee also takes a number of pain medications to control her severe pain in both forearms and hands, and in her neck. (Dec. 6-7.)

At the outset of the employee's claim, Travelers paid § 34 temporary total incapacity benefits, on a without-prejudice basis, from June 18, 1996 until approximately March 11, 1997, when the employee returned to work. (Insurer's Notification of Payment dated February 21, 1997; Insurer's Notification of Termination of Weekly Compensation dated April 16, 1997.)[3] Over three years later, the employee filed a claim for temporary partial incapacity benefits from and after September 11, 2000, and for payment of her Botox injections treatment. Following a § 10A conference, Travelers was ordered to pay § 35 benefits "from September 1 [sic], 2000 and continuing, plus medical benefits including but not limited to Botox injections as recommended by Dr. Audette." (Dec. 2.) Travelers appealed that order but, following a § 11A impartial medical examination of the employee by Dr. Moo K. Kim on January 24, 2001, Travelers withdrew its appeal prior to hearing.[4] (Id.)

In September 2001, Travelers filed a complaint to modify or discontinue weekly compensation. By § 10A conference order filed on April 2, 2002, the administrative judge denied the complaint, and Travelers appealed. The employee claimed entitlement to ongoing § 35 partial incapacity benefits from September

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[3] We take judicial notice of the documents in the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3.

[4] Although Hartford had assumed the risk as of July 27, 1999, it was not a party to the original conference of December 5, 2000. When Travelers withdrew its appeal of that conference order, it accepted liability for all incapacity and medical benefits awarded to the employee in that order, Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 314 n.1 (2003), Lape v. Town Lyne House, 10 Mass. Workers' Comp. Rep. 805, 807 (1996), Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 108-109 (1996), up to September 21, 2001, the date of its modification/ discontinuance complaint. See Cubellis v. Mozzarella House, Inc., 9 Workers' Comp. Rep. 354 (1995).

21, 2001 and continuing, as well as medical benefits, including Botox injections. (Id.)

Pursuant to § 11A, Dr. Kim examined the employee a second time on July 9, 2002. Following the issuance of his report, Travelers filed a motion to join Hartford, which had assumed the risk on July 27, 1999, and to have Dr. Kim's report declared inadequate and the medical issues complex. (Dec. 4-5.) The judge allowed the motion to join, but denied the § 11A aspect of the motion, and both insurers proceeded to hearing. After the hearing, Travelers deposed Dr. Kim, and again moved for additional medical evidence on the grounds of medical complexity and inadequacy. The judge denied the motion, and found Dr. Kim's report adequate except for the pre-examination "gap" period.[5] In addition, the judge took judicial notice of Dr. Kim's first impartial medical report dated January 24, 2001. (Dec. 4.)

The judge identified the issues at hearing as:

1. Whether the Employee is entitled to weekly benefits under the Act, and if so, whether Travelers Insurance Company or Hartford Insurance Company is responsible for the Employee's incapacity to earn her average weekly wage.
2. Whether the Employee's medical treatment is reasonable, necessary, and related to the industrial injury, and if so, whether Travelers Insurance Company or Hartford Insurance Company is responsible.

(Dec. 5.) Based on the adopted opinions of the impartial medical examiner, the judge decided both issues in the employee's favor, and found Travelers remained liable for payment of both incapacity and medical benefits, including the disputed Botox injections. We affirm the judge's findings as amply supported by the only expert medical opinion in evidence.

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[5] Given the first impartial medical examination by Dr. Kim on January 24, 2001, and Travelers' subsequent withdrawal of its appeal of the December 2000 conference order, there was no dispute as to Travelers' liability for both incapacity and medical benefits until September 21, 2001. See footnote 4, supra. Thus, the gap period here was from

Dr. Kim diagnosed the employee with chronic pain syndrome from the dystonia in both arms, and causally related that diagnosis to her industrial injury of May 30, 1996. He further opined that at his second examination of the employee in July 2002, she had "more prominent clinical signs" of reflex sympathetic dystrophy in both arms than when he examined her in 2001. Dr. Kim opined that there had been no complications from a non-work-related fracture of the employee's right wrist in December 2001. He also opined that continuing Botox injections were well indicated, and it was appropriate that their frequency be increased to three to four times a year. (Dec. 7-8; Ex. 2.)

Travelers deposed Doctor Kim on January 14, 2003. As to the doctor's deposition testimony, the judge noted:

> Dr. Kim did not find much in the way of medical change since his [first] examination of the Employee except for a fracture of her right wrist . . . Even if there were complications with the Employee's right wrist it would not change Dr. Kim's opinion as to causal relationship of her diagnosed condition . . . Dr. Kim found no changes in his examination of the Employee's neck from when he examined her on January 24, 2001 . . . Dr. Kim opined the Employee has intractable chronic pain syndrome, which is caused by dystonia . . . Dystonia is the irregular or high increase in muscle tones by some medical reasons which cannot be specified . . . The Employee has carpal tunnel syndrome in both her right and left wrist . . . Dr. Kim does not know what the Employee's work as a paralegal entailed . . . Dr. Kim opined that the cause of the Employee's medical condition to be worse [sic] on July 9, 2002 than January 24, 2001 is *because some medical conditions deteriorate* and some conditions improve . . . The major cause of the Employee's medical condition is overstrain from repetitive motions around the upper body caused by physical activities . . . Dr. Kim suspected RSD when he first examined the Employee in [sic] January 24, 2001 . . . Dr. Kim's physical findings in the second examination indicated changes in the Employee's arms and the symptom intensity, and the *changes in condition were the result of the natural progression of the conditions found in January 2001*, and not related to the Employee's right wrist fracture . . . Dr. Kim's diagnosis in January 2001 of chronic arm pain compatible with complex regional pain disorder or RSD, and the diagnosis

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September 21, 2001 to July 9, 2002 only. In any event, none of the parties submitted medical evidence for that "gap period." (Dec. 4.)

> of July 2002, was the same except for there were more symptom ideology [sic] and physical findings . . . Dr. Kim opined that based upon his examination of the Employee in July, 2002 the diagnosis is causally related to repetitive activities at the Employee's work . . . Dr. Kim opined the Employee's modified job, hours and work restrictions were appropriate.

(Dec. 8-9.) (Citations omitted; emphasis in original.)

The judge adopted those opinions, (Dec. 9), and accorded them prima facie weight. (Dec. 4.) He then defined the crucial issue before him:

> The question in this matter is whether the incapacity suffered by the Employee is "simply the natural physiological progression of a condition following the initial incident or the result of a new compensable injury."

The judge found that, "[a]lthough the Employee's employment may have had a deleterious effect on her weakened upper extremities . . . it did not amount to a new personal injury." (Dec. 10.) (Citations omitted.) Expressly adopting Dr. Kim's opinion, the judge also found that "the Employee's pain rehabilitation has been appropriate, . . . continuous treatment with Botox injection is well indicated to maintain the Employee's current functional status and to maximize her symptom relief . . . and an increased frequency of these injections to three or four times a year is appropriate." (Dec. 12.) We address Travelers's challenges to these findings.

The Adequacy of the § 11A Impartial Medical Report

Travelers argues that Dr. Kim's opinion, which the judge expressly adopted, was inadequate, and that the judge should have allowed the parties to submit additional medical evidence. Specifically, Travelers contends that Dr. Kim's admission on cross-examination that he did not know what the employee's modified job specifically entailed, (Dep. 35), renders his opinion inadequate. We disagree.

Both of his reports indicate that Dr. Kim was aware of the general requirements of the employee's job, as well as the modifications made by the

employer. In his January 24, 2001 report, of which the judge took judicial notice, Dr. Kim noted that Ms. Kautz was working part-time as a paralegal performing light duty, "with multiple modifications in terms of maintaining postures and also voice activated system for her typewriting." The doctor testified that she was working part-time as a paralegal doing office work. (Dep. 10.) That he could not recite her specific job duties does not render his opinion inadequate as a matter of law. Given the employee's description of her work, we think the impartial physician's understanding of her job as a paralegal, performing office work with the accommodations that had been made by the employer, provides an adequate basis for his opinion on incapacity and causal relationship. See Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644 (2003)(where impartial physician knew employee did the "usual things a store owner did," but was not aware of specific job activities, and did not change opinion upon viewing videotape of employee's activities, causal relationship opinion adequate to hold first insurer liable).

Travelers further argues inadequacy, claiming that Dr. Kim improperly relied solely on the employee's statements in determining that her right wrist fracture had no effect on her need for Botox injections. Again, the record contradicts Travelers' argument. Dr. Kim stated that the physical changes he found were in both of the employee's hands and arms, not just the wrist she fractured, (Dep. 50), thus basing his conclusion, at least in part, on his own physical examination of the employee.[6]

[6] Travelers also argues that Dr. Kim's opinion is rendered inadequate by his failure to review all the medical records provided to him, specifically the report of Hartford's medical expert, Dr. William Donahue. This argument presumes that the department forwarded Dr. Donahue's report to Dr. Kim. The record does not support this presumption. Dr. Kim testified that he did review the reports forwarded by the department for both impartial examinations. (Dep. 6-7, 16-17, 19.) Because Hartford was not joined until September 4, 2002, and because Dr. Donahue did not examine the employee until October 24, 2002, (Tr. 5), it is chronologically established that Dr. Kim did not receive Dr. Donahue's report before he issued his written report of July 9, 2002.

Lastly, Travelers argues that Dr. Kim's testimony was inconsistent, and therefore inadequate, in that he opined the employee's worsened condition was due to both the natural progression of her original injury, and to an aggravation of her symptoms by work activities. (Travelers br. 10-11; Dep. 24-25.) However, symptom aggravation does not necessarily indicate a new injury. Dembitzski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348, 356 (1999), aff'd Mass. App. Ct. No. 2004-P-1031, slip op. (Dec. 21, 2004). Although the doctor's testimony was "not a model of clarity," Dembitski, supra at 358, throughout his deposition, Dr. Kim consistently reiterated his opinion that the employee's condition had worsened due to its natural progression. (Dep. 31-32, 36, 50, 52-53). Although he focused primarily on the question of whether the non-work-related wrist fracture had caused the deterioration in the employee's condition, we are satisfied that he did consider the potential contribution of her work as a paralegal to that deterioration, and found there was none.

The administrative judge correctly found the impartial medical opinion adequate, and the medical issues not complex. He did not abuse his discretion in

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At the November 8, 2002 hearing, the adminstrative judge stated, "Dr. Donahue's report will be sent to the impartial examiner once received by me and Dr. Donahue [sic] shall review that report prior to deposition." Id. However, Dr. Kim testified that he had not received any additional medical records from the department within the month prior to his January 28, 2003 deposition. (Dep. 62.) In any event, even if Dr. Kim never saw the report, we are at a loss to understand why Travelers insists he should have, and how it is prejudiced because he didn't. We take judicial notice of Dr. Donahue's report in the Board file, see footnote 3, supra, and in particular his opinion that the employee,

> still has some incapacitation stemming from the fracture but apparently what is limiting her ability to work full-time, is the degree and frequency of the dystonia . . . [H]er complaints actually began before the date of May 30, 1996 and . . . she has had continued problems for approximately a year before that so *there is continuity of symptoms consistent with the findings and the diagnosis of dystonia. She has had only some mild aggravation relative to the fracture of the wrist. I would recommend continuing the Botox treatments, as this has apparently been the one effective modality.*

(October 24, 2002 Donahue report; emphasis added.)

denying Travelers's § 11A motion, and, there being no other medical opinion in evidence, see footnote 5, supra, he properly accorded Dr. Kim's report and testimony prima facie weight.

The Finding of Liability against Travelers

Whether the employee suffered a new injury, caused either by a specific incident or through cumulative stress, after Hartford came on the risk, is, in the first instance, a question of fact to be determined by the judge. "[T]he judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999). As long as the adopted medical and lay evidence can be read to support a finding of liability against the first insurer, that finding will be upheld, even though the evidence could support a different result. Miranda, supra at 649.

Travelers correctly maintains that "[t]he judge is required to assess liability against the second insurer if a second injury "was even to the slightest extent a contributing cause of the subsequent disability." Rock's Case, 323 Mass. 428, 429 (1948).

> To be compensable, an injury must arise from an identifiable work-related incident or series of incidents or from an identifiable condition that is not common and necessary to all or a great many occupations. Zerofski's Case, 385 Mass. 590, 594-595 (1983). The injury need not result from a specific incident or occur at a definite time, but "may develop gradually from the cumulative effect of stresses and aggravations." Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973). Where an injury arises from such cumulative aggravation, the date of the injury becomes the date the accumulated insults cause a need for medical treatment or incapacity for work. DeFilippo's Case, 284 Mass. 531, 533-534 (1933); Jaime v. Endicott & Colby, 12 Mass. Workers' Comp. Rep. 27, 29 (1998).

Dembitzski, supra at 356-357. However, "[t]he law is well established that the deleterious effects of work subsequent to an industrial injury do not amount to a new industrial injury where the incapacity suffered is 'simply the natural

physiological progression of a condition following the initial incident.' " Gentile v. Carter Pile Driving, Inc., 17 Mass. Worker's Comp. Rep. 435, 438 (2003), quoting Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86 (1993).

Thus, the critical issue is not whether Ms. Kautz's condition worsened while she worked as a paralegal; indeed, there seems to be no real dispute on that point. That the employee's symptoms worsened over time, or even that her condition worsened by degree, does not necessarily indicate that her modified work as a paralegal caused a new injury.[7] See Costa's Case, 333 Mass. 236, 288-289 (1955)(finding against first insurer upheld where adopted medical opinion, though equivocal on contribution of second employment, causally related disability to original injury); Cymerman v. Hiller Co., Inc.,10 Mass. Workers'

[7] In Gentile, we upheld an award against the first insurer where the adopted impartial medical opinion was that employee's lighter work after the second insurer came on the risk aggravated his symptoms to the point of disability, but did not aggravate or change his underlying problem, his disability or his permanent loss of function. Supra at 437-438. Cf., Long's Case, 337 Mass. 517, 521 (1958)(a mere "disabling increase in symptoms of some days' duration" may impose liability on successive insurer). Even if as Travelers contends, Dr. Kim's opinion was ambiguous as to the contribution of the employee's work activities after Hartford assumed the risk, the judge could properly consider the doctor's expert opinion in conjunction with the other evidence – in particular, the employee's testimony – to conclude that she did not suffer a new injury during her continuing work for the employer. Josi's Case, 324 Mass. 415, 418 (1949). The employee testified as to the many accommodations her employer made over the years after she was transferred to the position of paralegal – including an adjustable chair, a desk of the proper height with an ergonimically correct keypad, a special mouse which is optically navigated, reducing the amount of pressure needed to click, and the voice-activated Dragon system, to minimize her typing. (Tr. 19, 41, 59.) She also testified that her duties as a paralegal have been basically the same since at least January 2000, although she does less when she has more pain, which happens when she does not get the Botox injections. (Tr. 38.) The employee related that her job duties include occasionally making trial booklets, which are not too heavy for her to lift, putting things in light, collapsible crates containing hanging files, and summarizing medical records. She does not take anything to court, move boxes of legal pleadings, or carry anything heavy. (Tr. 42-44.) She does no major typing, (Tr. 19), but does have to correct the Dragon voice-activated computer system, since it is "not 100% [accurate]." (Tr. 59.) The employee did not believe she had suffered a reinjury or a new injury. (Tr. 64.)

Comp. Rep. 486, 488 (1996)(liability finding against second insurer reversed where uncontradicted medical opinion was that second period of incapacity and intensification of employee's symptoms were related to original injury); Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564 (1995)(adopted medical opinion acknowledged subsequent work aggravated employee's knee condition, but also indicated knee would progressivly deteriorate regardless of employee's activities). The judge's finding of no new personal injury and his assessment of continuing liability against Travelers is supported by the evidence and not tainted by error of law. We affirm that aspect of his decision.

The Botox Injections

Travelers' brow is particularly furrowed by the judge's finding that "continuous treatment with Botox injection is well indicated to maintain the Employee's current functional status and to maximize her symptom relief . . . [and that] an increased frequency of these injections to three or four times a year is appropriate." (Dec. 12.) In so finding, the judge said he adopted Dr. Kim's opinion, id., but Travelers argues that this was not the final opinion expressed by Dr. Kim at deposition. It also contends that the Botox treatments were no longer beneficial to the employee, and as such were not "adequate and reasonable health care services" under § 30. Again, we disagree.

In his report of July 9, 2002, Dr. Kim opined that "continuous treatment with Botox injections is well indicated to maintain her current functional status and to maximize her symptom relief. Also, to maximize the therapeutic effect, an increased frequency to three to four times a year is well appropriate as well." (Ex. 2, p. 2.) At deposition, the doctor was asked whether the employee's condition would be affected if she could not receive the Botox injections for period of a year or more. Dr. Kim replied: "I don't do Botox injections, so I cannot tell. I cannot tell the specific problems with these Botox injections." (Dep. 54-55.) Responding to follow-up questioning as to whether he held to the opinion he gave in his report

that continued Botox injections three or four times a year were appropriate, Dr. Kim stated that he did. (Dep. 55-56.) However, there was a later exchange between Travelers' counsel and the doctor:

> Q: I do believe that Ms. Kautz testified that after the last Botox treatment it had no effect, no long-term effect, other than three weeks. In your opinion, would it be necessary and reasonable for Ms. Kautz to have Botox treatments *every three weeks*?
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> A: My experience is limited so I cannot tell you what would indicate frequent injections. This is a very expensive procedure. So, we have to weight [sic] whether it is cost effective.
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> Q: So you would have no opinion as to whether or not it would be reasonable and necessary?
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> A: Again, I would have to weigh which one is more important to maintain the patient's symptoms, the fee or the physical activities or the medical cost, how much they ask for these injections.

(Dep. 59-60; emphasis added.)

Travelers correctly posits that it is the final conclusion of the physician at the moment of testifying which must be taken as his expert opinion. Perangelo's Case, 277 Mass. 59, 64 (1931). However, we do not agree that the above-quoted testimony even hints at a recantation by Dr. Kim of his original opinion as to the reasonableness and necessity of continuing and more frequent Botox injections. Counsel for Travelers asked Dr. Kim whether injections every *three weeks* were indicated. The employee was not claiming continuing injections at that frequency, nor did the judge order Travelers to pay for injections at that frequency. (Dec. 12-13.) Thus, Dr. Kim's alleged inability to give an opinion on the question as posed is irrelevent, and not fatal to the employee's burden of proof, as Travelers argues. Compare Smith v. Alan Richey, Inc., 16 Mass. Workers' Comp. Rep. 200, 204 (2002)(regarding inability of impartial physician to offer opinion).

The decision of the administrative judge is affirmed. Pursuant to § 13A(6), Travelers is ordered to pay employee's counsel a fee of $1,312.21.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **March 22, 2005**